

|                                   |   |                                      |
|-----------------------------------|---|--------------------------------------|
| STATE OF SOUTH CAROLINA           | ) | BEFORE THE CHIEF PROCUREMENT OFFICER |
| COUNTY OF RICHLAND                | ) |                                      |
|                                   | ) | DECISION                             |
| In the Matter of Protest of:      | ) |                                      |
|                                   | ) | CASE No. 2008-130                    |
|                                   | ) |                                      |
| Green's Exterminating             | ) |                                      |
|                                   | ) |                                      |
|                                   | ) |                                      |
| Trident Technical College         | ) | POSTING DATE:                        |
| IFB No. 071008-910-147RT-07/30/08 | ) |                                      |
| <u>Pest Control Services</u>      | ) | January 16, 2009                     |

This matter is before the Chief Procurement Officer (CPO) pursuant to a letter of protest from Green's Exterminating. With this invitation for bids (IFB), Trident Technical College (TTC) attempts to procure pest control services for all buildings of its three campuses. In the letter, Green's Exterminating (Green's) protested TTC's award to Clegg's Pest Control (Clegg's) objecting to TTC's rejection of his company's bid as non-responsible.

In order to resolve the matter, the CPO conducted a hearing January 8, 2009. Appearing before the CPO were Green's, represented by Derrick Green; Clegg's, represented by Gene Wall; and TTC, represented by Carol Belcher, Procurement Manager.

#### **NATURE OF PROTEST**

The letter of protest is attached and incorporated herein by reference.

#### **FINDINGS OF FACT**

The following dates are relevant to the protest:

1. On July 14, 2008, TTC issued the IFB. [Ex. 2]

2. On July 22, 2008, TTC issued Amendment No. 1, the only amendment to the IFB. [Ex. 3]
3. On August 11, 2008, TTC opened the following bids:

| <u>Bidder</u>                 | <u>Bid Amount</u> |
|-------------------------------|-------------------|
| C-Mac Pest Control            | \$9,975.00        |
| Green's Exterminating         | 12,000.00         |
| Clegg's                       | 12,816.00         |
| Carolina Exterminating        | 12,981.60         |
| Dodson Brothers Exterminating | 15,708.00         |
| Gregory Pest Control          | 29,166.72         |

After applying the resident vendor preference, the amended bids were as follows:

|                                |             |
|--------------------------------|-------------|
| C-Mac Pest Control             | \$10,673.25 |
| Green's Exterminating          | 12,840.00   |
| Clegg's                        | 13,713.12   |
| Carolina Exterminating         | 13,890.31   |
| Dodson Brother's Exterminating | 15,708.00   |
| Gregory Pest Control           | 29,166.72   |

[Ex. 5]

4. On September 30, 2008, after rejecting C-Mac Pest Control's bid as nonresponsive and Green's Exterminating as a non-responsible bidder, TTC posted a statement of award to Clegg's. [Ex. 6]
5. On October 10, 2008, the CPO received Green's protest.

### **CONCLUSIONS OF LAW**

According to Bob Tyner, TTC Procurement Officer, he rejected the low bid of C-Mac Pest Control as nonresponsive. C-Mac has not protested TTC's rejection of its bid. Therefore, the CPO did not investigate this matter fully.

Mr. Tyner rejected Green's as a non-responsible bidder due to his concerns regarding Green's lack of experience, personnel, and back-up strategy. He felt Green's could not manage the scope of work required by the IFB. Green's protests Mr. Tyner's determination.

Regarding award of an IFB, the Consolidated Procurement Code requires that award of an IFB must be made to “the lowest responsive and responsible bidders whose bid meets the requirements of set forth in the invitation for bids.” [11-35-1520(10)] The Code defines a responsible bidder as “a person who has the capability in all respects to perform fully the contract requirements and the integrity and reliability which will assure good faith performance which may be substantiated by past performance.” [11-35-1410(6)] After considering all available information, TTC determined Green’s to be a non-responsible bidder.

The IFB stated the scope of work was “all labor, materials, and equipment necessary to provide monthly pest control services in accordance with the attached building listing and schedule for control or extermination of the following pests and rodents on Trident Technical College’s Main Campus, 7000 Rivers Avenue, North Charleston, SC, Berkeley Campus, 101 Live Oak Drive, Moncks Corner, SC and Palmer Campus, 66 Columbus Street, Charleston, SC”, a total of 895,870 square feet. The IFB listed the pests as ants, bedbugs, fleas, lice, spiders, sowbugs, mice, rats, roaches, silverfish, fruit flies, flies, June bugs, centipedes, millipedes, gnats, and mosquitoes. [Ex. 1, p. 10] The IFB listed twenty-three buildings at the Main Campus, two buildings at the Berkeley Campus, and one building at the Palmer Campus to be treated monthly. [Ex. 1, pp. 19 and 20] The IFB required further that seven kitchens be treated once a month, two kitchens be treated every two weeks, and seven more kitchens and a dining room be treated weekly [Ex. 1, p. 11]. The IFB required that all the kitchens be treated after the areas closed down and all food removed after 2:00 PM on Fridays. [Ex. 1, p. 10] The IFB also required the contractor to respond within twenty-four hours of notice of service requests for emergency treatment and retreatment, at no additional costs, and within 48 hours anytime pests returned. [Ex. 1, p. 10, Items 4 and 5]

After evaluating Green's bid, Mr. Tyner was concerned about Green's capability to perform the scope of work required by the IFB. Needing additional information, he sought references. Mr. Green responded with references that when TTC followed up gave Green's high marks for performance. Mr. Tyner sought information regarding Green's number of personnel. Green's responded one, himself. Mr. Tyner sought information regarding Green's experience. Mr. Green responded that his company had only been in business for one year, but that he had six years experience with another pest control company. Mr. Tyner sought information regarding Green's experience regarding contracts of this size. Mr. Green responded that he had served MUSC, an even bigger campus. During the hearing, it became known that Green's has not served MUSC as its full-time contractor, but as an as-needed contractor pending the award of a long-term contract. Green's provided spot treatments, not routine, scheduled treatments. Mr. Tyner sought information regarding Mr. Green's experience treating commercial kitchens, which must be licensed and graded for cleanliness by Public Health authorities. According to Mr. Tyner's notes, Mr. Green provided no experience treating commercial kitchens. Mr. Green states that he has experience treating kitchens, and one kitchen which has all the attributes of a commercial kitchen. Mr. Tyner sought information about Green's equipment, specifically its trucks. Mr. Green responded that Green's had one truck. Mr. Green noted at the hearing that it is a 2007 model.<sup>1</sup> Mr. Tyner inquired about Green's back up strategy should Mr. Green be unable to work or his truck unreliable. Mr. Green stated that he had an arrangement with another pest control company, Blue Water Pest Solutions, if needed. TTC noted they had not requested or been provided no information on Blue Water Pest Solutions, its qualifications, or insurance.

After evaluating Green's bid and weighing the additional information provided, Mr. Tyner prepared a written determination finding Green's non-responsible writing: 1) The offeror has not

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<sup>1</sup> Unless the truck has exceptionally high mileage and is out of warranty, one would expect that a replacement vehicle is provided by the dealer when service is required due to breakdown.

provided similar contracted services to entities of equal size and complexity as TTC, 2) the offeror does not have the level of direct experience in providing similar contracted services for commercial kitchens and food service areas, 3) the offeror does not have the equipment and personnel in place to provide the services, and 4) the offeror does not have an established, reliable back-up plan. [Ex. 9]

### **DETERMINATION**

The Code imposes a duty on every procurement officer to determine bidder responsibility before every award reading, “Responsibility of the bidder or offeror shall be ascertained for each contract let by the State based upon full disclosure to the procurement officer concerning capacity to meet the terms of the contracts and based upon past record of performance for similar contracts.” [11-35-1810(1)]

The IFB stated virtually no minimum requirements for vendor responsibility, only that the offeror must “Currently be in the pest control business and have been in the pest control business for over (1) year” [Ex. 2, p. 12, The Offeror Must] and required the bidder to sign the bidding schedule certifying compliance with this requirement. [Ex. 2, p. 20] However, stating minimum standards of responsibility in solicitations is not required. Unlike a determination of responsiveness, which speaks to a bidder’s compliance with bidding requirements and should be determinable immediately at the time of bidding, a determination of responsibility is not based solely upon a bidder’s submittal and is not required until the time of award. The regulations state, “The determination (of responsibility) is not limited to circumstances existing at the time of opening.” [19-445.2125(D)] In determining responsibility, the procurement officer may obtain and rely on any sources of information, including but not limited to the prospective contractor; knowledge of personnel within the using or purchasing

agency; commercial sources of supplier information; suppliers, subcontractors, and customers of the prospective contractor; financial institutions; government agencies; and business and trade associations.

Quite often, agencies require bidders to supplement their bids with background, experience, financial, and other information to be used to satisfy the procuring agency's concerns regarding the bidder's responsibility. The Code and regulations authorize procuring agencies to require additional information of bidders in determining bidder responsibility. The regulations read, "At any time prior to award, the prospective contractor shall supply information requested by the procurement officer concerning the responsibility of such contractor." [19-445.2125(B)] TTC sought additional information from Green's. On September 4 and 11, Mr. Tyner spoke with Mr. Green inquiring about Green's trucks and equipment, staffing plan to service the three campuses, plans for responding to emergency calls, experience with pest control in commercial kitchens, general experience and back-up plans. Green's responded openly each and every time.

Yet, after evaluating the additional information, Mr. Tyner determined Green's non-responsible.

The decision before the CPO hinges on the merit of TTC's determination and the due diligence exercised by TTC in reaching its conclusion.


The CPO is impressed with Mr. Tyner's diligence in satisfying his duty to determine Green's responsibility prior to award. TTC evaluated Green's bid, followed up with Green's references (which were quite complimentary) [Ex. 14], sought additional information from Green's on September 4, 2008 [Ex. 10], evaluated it and sought more information from Green's on September 11, 2008 [Ex. 11]. The CPO cannot recall observing a more thorough effort by a procurement officer in determining bidder responsibility to ensure the state's risk is mitigated upon award of a contract. The CPO is also impressed with Mr. Green's willingness and patience in responding to TTC's requests and inquiries. All parties proceeded through the determination most professionally and amicably.

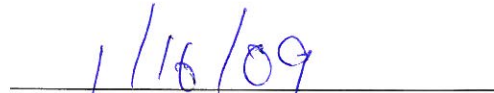
In the end, Mr. Tyner determined, however, that he was not satisfied that Green's could perform the scope of work required under the contract. In his written determination and during the hearing, he expressed concern with Green's experience, but primarily, he expressed concern with Green's capacity as a one-person operation to complete pest control services for TTC's 895,870 square feet of space and sixteen kitchens, some of which are commercial kitchens required to be treated every week, spread over twenty-six buildings on three campuses located in three different cities in accordance with the schedule demanded by the IFB. Ms. Belcher of TTC stated during the hearing, that their determination of non-responsibility was "a matter of (Green's) capacity." She did not think one man could do it.

She and Mr. Tyner may or may not be right. However, the decision to trust a bidder with a contract is a matter of business judgment that must be made weighing the advantage of a low bid versus the risk of loss that the State might incur if the low bidder fails to perform. The regulations recognize the procurement officer's deference in determining bidder responsibility, reading, "Before awarding a contract or issuing a notification of intent to award, whichever is earlier, the procurement officer must be satisfied that the prospective contractor is responsible." [19-445.2125(D)] [Emphasis added] In a written determination, Mr. Tyner declared that he, in his business judgment, found Green's was not qualified or capable to perform the contract.

In this case, the standard for review is not whether the CPO agrees with Mr. Tyner's written determination or would rule the same way initially or based upon the additional information received during the hearing. The Code sets a higher than usual legal standard for reviewing Mr. Tyner's written determination. It reads, "The determinations required by . . . Section 11-35-1810(2) (Responsibility of Bidders and Offerors, Determination of Nonresponsibility) . . . are final and conclusive, unless clearly erroneous, arbitrary, capricious, or contrary to law" at the time Mr. Tyner made that determination. [11-35-2410] While Mr. Tyner's decision was not the only one possible on the information provided, the

CPO cannot conclude that Mr. Tyner's decision is clearly erroneous, arbitrary, capricious, or contrary to law. Accordingly, the protest is denied.

  
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R. Voight/Shealy  
Chief Procurement Officer  
for Supplies and Services

  
\_\_\_\_\_  
Date

Columbia, S.C.



## STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of posting of the decision in accordance with subsection (5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel or to the Procurement Review Panel, and must be in writing, setting forth the reasons for disagreement with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or judicial.

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Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: [www.procurementlaw.sc.gov](http://www.procurementlaw.sc.gov)

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 83.1 of the 2008 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410(4). . . . Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2008 S.C. Act No. 310, Part IB, § 83.1. PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, a business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003).

Dear Chief Procurement Officer,

The reason I am protesting this award, the information is incorrect. I have been in the Pest Control industry for over six years. One of my references, MUSC, has over 2 million Sq Ft. I have treated commercial kitchens from day one. I have the proper equipment for this contract. If something happens to me where I can't perform the work I have a back up plan. I have a company call Blue Water Pest Solutions LLC as a back up plan. No one From TTC contacted them. My bid is also lower than Glegg's Pest Control. All of my references came back positive. Please look into this.

Green's Exterminating LLC

RCVD MHO

OCT 7 '08 TU 9:24 AM